INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	3
Statute Involved	3
Statement	3
Specifications of Error	5
Reasons For Granting The Writ	5
Conclusion	7
Appendix A. Statutes	8

CITATIONS

	Page
Cases:	
Bailey vs. Central Vermont Ry. Co., 319 U. S. 350	6
Ellis vs. Union Pacific R. Co., 329 U. S. 649	6
Lavender vs. Kurn, 327 U. S. 645	6
Tiller vs. Atlantic Coast Line R. Co., 318 U. S. 54	6
Statutes:	
28 U. S. C. Sec. 1257	2
45 U. S. C. Sec. 51 as Amended	3, 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No.....

MRS. EUVERLIA ROBERTS, as Administratrix of the Estate of James Emory Roberts, Deceased,
Petitioner and Appellant Below,

vs.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a corporation,
Respondent and Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Mrs. Euverlia Roberts, who sues in her capacity as Administratrix of the Estate of James Emory Roberts, Deceased, respectfully prays that a writ of cer-

tiorari issue under the seal of this Honorable Court to the Supreme Court of Alabama, commanding said Court to certify and send to this Honorable Court the full and complete transcript of the record and of the proceedings of said Supreme Court had in the case numbered and entitled on its docket as Sixth Division No. 902, Mrs. Euverlia Roberts, as Admrx., etc. vs. Alabama Great Southern Railroad Company, to the end that this case may be reviewed and determined by this Honorable Court as provided for by the Statutes of the United States.

OPINIONS BELOW

The judgment of the trial court (R. p. 7) is unreported. The first opinion rendered by the Supreme Court of Alabama in this case is reported in 250 Alabama 629, 35 So. 2d 509. The second and last opinion of the Supreme Court of Alabama in this case is reported in ..... Alabama, ..., 46 So. 2d 213.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on April 6, 1950, and timely Application for Rehearing filed therein was overruled and denied on May 18, 1950.

The statutory authority under which jurisdiction is invoked is 28 U. S. C. Section 1257.

It is further contended that this Court has jurisdiction to review the judgment here in question because the Supreme Court of Alabama has decided a Federal question in a way probably in conflict with the applicable decisions of this Court, in this: In a case brought under the provisions of the Federal Employers' Liability Act (45 U. S. C. Section 51 et seq., as Amended), the trial court directed a verdict in favor of the defendant therein, and the Su-

preme Court of Alabama on appeal approved the action of the trial court, and affirmed a judgment rendered in favor of the defendant therein.

QUESTION PRESENTED

The sole question here presented is: Under the evidence adduced upon the trial of the cause was a question for jury determination presented upon the issue of alleged negligence on the part of respondent's servant?

STATUTE INVOKED

The pertinent statutory provision (45 U. S. C. Section 51) are prin[illegible] Appendix-A, infra p. 8.

STATEMENT

This is an action under the Federal Employer's Liability Act brought by Mrs. Euverlia Roberts in her capacity as Administratrix of the Estate of James Emory Roberts, Deceased, against the Alabama Great Southern Railroad Company to recover damages, for the benefit of the widow and two minor children of said decedent, for the death of said decedent alleged to have been caused by the negligence of Respondent's servant, while her said decedent was an employee of Respondent and was engaged in the line of his duty in the interstate commerce carried on by the Respondent.

The suit was commenced in the Circuit Court of Jefferson County, Alabama (Tenth Judicial Circuit of Alabama). (R. p. 3). The complaint (R. p. 3) contained a single count, stating a cause of action for negligence under the provisions of the Federal Employer's Liability Act.

At the conclusion of the first trial had in the cause there was a jury verdict and judgment in favor of Petitioner (Plaintiff) and against Respondent (Defendant) for the

sum of Fifty Thousand Dollars ($50,000.00), (R. p. 6). In due season the Respondent (Defendant) filed its motion for a new trial in the cause. The trial court granted the motion for a new trial upon the ground that the court should have directed a verdict in favor of Respondent (Defendant), and the verdict and judgment theretofore rendered in the cause in favor of Petitioner (Plaintiff) were set aside.

Thereafter Petitioner (Plaintiff) took her appeal to the Supreme Court of Alabama from the order and judgment of the trial court granting a new trial in the cause, and on May 20, 1948 the Supreme Court of Alabama rendered its opinion and judgment in said appeal, affirming the action of the trial court in granting the Respondent (Defendant) a new trial in the cause. The opinion of the Supreme Court of Alabama is reported as *Roberts vs. Alabama Great Southern R. Co.*, 250 Ala. 629, 35 So. 2d 509.

On December 13, 1948, the cause being again reached on the docket, was called for trial, and at the conclusion of the evidence on December 14, 1948 the trial court directed the jury to return a verdict in favor of Respondent (Defendant), (R. p. 6), which was done. Judgment was thereupon rendered in favor of the Respondent (Defendant). (R. p. 7). Within the time provided by law Petitioner (Plaintiff) took her appeal from said judgment to the Supreme Court of Alabama. (R. p. 1, 7). As hereinbefore stated, on April 6, 1950 the Supreme Court of Alabama rendered its opinion and judgment in the cause affirming the judgment of the trial court. (R. pp. 113 to 117). On April 18, 1950 Petitioner (Plaintiff) filed her Application for a Rehearing in the cause (R. p. 117), which was overruled and denied by the Supreme Court of Alabama on May 18, 1950 without opinion. (R. p. 119).

In general, the evidence relied upon to show negligence on the part of Respondent's servant was that he, as the engineer of one of Respondent's trains moving in inter-

state commerce, negligently operated said train into the path of a tornado which he saw approaching generally along and in close proximity to the track upon which the train was being operated; when, by the use of the means then at his command, he could have stopped the train in a place of safety outside of the apparent path of the tornado. The train being operated into the path of the tornado, the Petitioner's decedent, who was riding in the caboose of the train at his post of duty, was killed when the caboose was derailed and demolished.

SPECIFICATIONS OF ERROR TO BE URGED

The Supreme Court of Alabama erred:

1. In holding that the evidence adduced upon the trial of the cause was not sufficient to establish negligence on the part of Respondent's servant.
2. In holding that the evidence adduced upon the trial of the cause was not sufficient to present a question for jury determination upon the issue of negligence on the part of Respondent's servant.
3. In holding that the Respondent was entitled to have the jury instructed to return a verdict in favor of Respondent.
4. In affirming the action of the trial judge instructing the jury to return a verdict in favor of Respondent.

REASONS FOR GRANTING THE WRIT

The court below has decided a Federal question in a way which is in conflict with the decisions of this Court. The trial court judicially determined as a matter of law that there was no evidence of negligence on the part of the engineer in charge of the operation of Respondent's train on the occasion in question, and that finding was concurred in and affirmed by the Supreme Court of Alabama. Such a decision is believed to be in direct conflict with the

decisions and holdings of this Court in the cases of *Tiller vs. Atlantic Coast Line R. R. Co.,* 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed 610; *Bailey vs. Central Vermont Ry. Co.,* 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; and *Lavender vs. Kurn,* 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; *Ellis vs. Union Pacific Railroad Company,* 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572. It is believed that the evidence was such that the jury was authorized to infer and find from the evidence that the Respondent's engineer was guilty of negligence in failing to stop the train before it had entered the apparent path of the tornado. This belief is fully substantiated by the fact that the jury which heard the evidence upon the first trial found that there was negligence, and returned a verdict in favor of Petitioner in the sum of Fifty Thousand Dollars. These twelve jurors concluded, after hearing the evidence, that there was an evidentiary basis for a finding of negligence and returned their verdict accordingly. Under the foregoing decisions of this Court it is the function and right of the jury to draw such inferences from the proven facts as may seem reasonable to them, and having drawn such inferences and reached their conclusion thereupon, it is beyond the right and competence of the court to set aside the decision of the jury merely because the court may have reached a different conclusion from that reached by the jury.

It is believed that the action of the trial court in setting aside the verdict of the jury in the first trial, and in directing the jury to return a verdict in favor of the Respondent at the conclusion of the second trial, each constituted a direct usurpation of the historic function of the jury; and that the Supreme Court of Alabama in affirming the action of the trial court in each instance transcended its function and competence, denying to Petitioner a part and parcel of the remedy afforded her under the provisions of the Federal Employer's Liability Act.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this case is one in which this Court should grant and issue a writ of certiorari, and thereafter review and reverse the decision of the court below.

Respectfully submitted,

FRANCIS H. HARE
1918 Comer Building
Birmingham 3, Alabama
Counsel for Petitioner

Date: August 1, 1956

APPENDIX-A

Section 51. LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE—Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. (Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65).

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act (Sections 51 to 60 of this title), be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908), as the same has been or may hereafter be amended. (As amended Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404).

Office - Supreme Court,
FILED
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CHARLES ELMORE GROP

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 236.

MRS. EUVERLIA ROBERTS, as Administratrix of the Estate of James Emory Roberts, Deceased,

Petitioner and Appellant, Below,

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a Corporation,

Respondent and Appellee Below.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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INDEX.

Page

Preliminary Statement 1

Statement of Facts 2

Summary of Argument 7

Argument 7

I. The Death of Petitioner's Intestate was Caused Solely by an Act of God 7

II. Liability Under Federal Employers' Liability Act Can Be Predicated Only Upon Actionable Negligence 14

III. Petitioner Has Assigned No Sufficient Reason for Granting Certiorari 15

Conclusion 16

TABLE OF AUTHORITIES.

Cases.

Atkinson v. *Chesapeake & O. Ry. Co.*, 74 W. Va. 633, 82 S. E. 502 11

Bailey v. *Central Vermont Ry. Co.*, 319 U. S. 350. . . .14, 15

Beamer v. *Virginian R. Co.*, 321 U. S. 763. 14

Blessing v. *Camas Prairie R. Co.*, 3 Wash. 2d 266, 100 P. 2d 416 11

Chisholm v. *Reading Co.*, 329 U. S. 807 14

Cowdrick v. *Penn. R. Co.*, 323 U. S. 799 14

Ellis v. *Union Pacific Railroad Company*, 329 U. S. 649 . . . . . .14, 15

Erie R. Co. v. *Welsh*, 242 U. S. 303 14

Fantini v. *Reading Co.*, 324 U. S. 856 14

Galveston, H. & S. A. R. Co. v. *Crier*, 100 S. W. (Texas) 1177 12

Great Northern R. Co. v. *Knapp*, 240 U. S. 464. 14

Lasagna v. *McCarthy*, 332 U. S. 822 14

Lavender v. *Kurn*, 327 U. S. 645. . . . . .14, 15

Leonard Bros. v. *Newton*, Tex. Civ. App., 71 S. W. 2d 613 11

L. & N. R. R. Co. v. *Finlay*, 237 Ala. 116, 185 So. 904. .10, 13

Page

McClary v. *Sioux City & P. R. Co.*, 3 Neb. 44..... 12
Negro v. *Boston & Maine R.*, 324 U. S. 862 14
Peru Heating Co. v. *Lenhart*, 48 Ind. A. 319, 95 N. E. 680 12
Pierce v. *Great Falls & C. Ry. Co.*, 56 P. (Mont.) 867 12
Roberts v. *Alabama Great Southern R. Co.*, 250 Ala. 629, 35 So. 2d 509 12
Scarborough v. *Pennsylvania R. Co.*, 326 U. S. 755.... 14
Teter v. *Olympia Lodge No. 1, I.O.O.F.*, 195 Wash. 185, 80 P. 2d 547 11
Tiller v. *Atlantic Coast Line R. R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610 .....14, 15
Trust Co. of Chicago v. *Erie R. Co.*, 334 U. S. 845..... 14
Waller v. *Northern P. T. Co.*, 329 U. S. 742 14
Whitaker v. *Pitcairn*, 351 Mo. 848, 174 S. W. 2d 163 11
Wolfe v. *Henwood*, 332 U. S. 773 14

STATUTES.

Federal Employers' Liability Act, 45 U. S. C. § 51, *et seq.*.....7, 14, 16

MISCELLANEOUS.

1 Corpus Juris Secundum, Act of God, page 1423.... 7
45 Corpus Juris, Negligence, page 632 8

IN THE

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ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a Corporation,

Respondent and Appellee Below.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

PRELIMINARY STATEMENT.

We do not question the jurisdiction of the Court to grant certiorari. We concede that the question whether the court below committed error in peremptorily charging the jury to return a verdict for the respondent may be properly presented upon the record in this case. However, the petitioner has filed no brief in support of the petition and, in

our view, the petition presents no sound ground upon which certiorari should be granted. The petition is insufficient in that it contains no statement of facts upon which the question posed could properly be presented, and, moreover, while the sole reason stated for granting the petition is a conflict of decision of the court below with certain decisions of this Court, it seems clear that the decision of the court below is not in conflict with any decision of this Court.

While we think the petitioner has failed to show any sound ground for granting certiorari, we shall state what we consider to be the material facts in this case and undertake to demonstrate that the decision of the court below is correct and that there should be no occasion for review, in any event.

STATEMENT OF FACTS.

On February 12, 1945, a tornado, which originated south of Meridian, Mississippi, moved in a northeasterly direction from Meridian, Mississippi, via York, Alabama, to and beyond Livingston, Alabama (R. p. 75). The calculated speed of the tornado cloud was around 45 miles per hour (R. p. 75). The total length of the path of the tornado was about 45 miles, of which 8 miles touched ground in the York-Livingston area (R. p. 75). The width of the path of the tornado was 150 yards, but it was said to be ¼ of a mile wide near Meridian (R. p. 75). However, the width of the path of the tornado, in the vicinity of Livingston, was 115 to 120 feet (R. p. 61). Nine people were killed and 63 people injured. Property damage was $220,000.00, including $25,000.00 damage to railway freight cars (R. p. 75).

The characteristics of a tornado were described by one of the witnesses, a meteorologist in charge of the United States Weather Bureau at Birmingham, Alabama, as a severe thunder storm which follows a fixed cloud pattern and that there is a distinctive cloud present at the time of a tornado. The base of the cloud has a dark, black or greenish chute, and usually air formations from these clouds—

when the tornado is approaching a funnel formation—can be seen dropping from the cloud to the ground. The funnel protrudes from the cloud base to the ground when the tornado hits the ground. Usually tornado clouds follow a regular course of travel, from the southwest to the northeast (R. p. 72). The funnel itself from which there is contact with the ground shifts or circles from side to side as the storm center progresses and moves (R. p. 73). The variation of the circle at the bottom of the funnel where it touches the ground depends upon the severity of the storm and the height of the cloud base. The variance of the width of the storm will be as much as ¼ of a mile. The center of disturbance within the cloud itself is the top of the funnel. The cloud formation at the top follows a steady course as it goes across the country, but the bottom (funnel) is what does the circling (R. p. 74). When the speed of a tornado is referred to as 45 miles an hour that means the forward progress of the tornado. There is a counterclockwise circulation in the funnel and there is no way of measuring the speed of the winds around the vortex of the funnel (R. p. 75). The path of a tornado itself (cloud) is dependent upon the wind flow at the level of the cloud base slightly before the funnel develops and moves in a straight course. After the funnel develops, the funnel will shift or twist on the surface of the earth to one side or the other of the storm path, but the center of the disturbance at the cloud level moves more or less in a straight line. The exact direction will depend upon the direction of the wind from 2 to 6 thousand feet above the earth's surface (R. p. 76). If the tornado comes to a rise (on the earth), it will not carry on bouncing but it will pick it (the earth) up at some point further on. It doesn't necessarily have to be a high spot, and the damage done also depends upon the sway of this funnel from side to side and it may sway as much as ¼ of a mile on either side of the end of the cloud. Some clouds are more dense than others (R. p. 77). The destructive force is where the funnel touches the ground. Out of that there

is a terrific wind velocity and a reduced area in the funnel which causes an explosive effect when it touches a house and that is caused when the funnel itself touches the ground. The funnel goes up and down and skips. There is no way of predicting how long a tornado will go on the ground. The Weather Bureau does not issue a prediction of tornadoes. "We issue a forecast of tornado symptoms which they develop from, but we have found when we predict that a tornado will hit an actual area, people will get in their automobiles and try to get away from that thing and more damage may be done that way." The Weather Bureau cannot tell when a tornado will hit a particular area. They form in a general area and as far as forecasting when they will hit a particular place, the Bureau cannot do that (R. p. 78).

The evidence describing the action of the tornado in this case is confined to the area between York, Alabama, and Livingston, Alabama, which is a distance of about 9 miles (R. p. 11). The tornado made three contacts with the earth over that distance, two of which touched the railroad track. One contact with the ground was about 1 or 2 miles from York, between York and Hixon (R. pp. 24 and 62). At that point, the tornado crossed the track from right (north) to the left (south) at an angle of 45 to 60 degrees (R. pp. 25 and 62). The second contact was made on the south side of the track at the Browder Place, located about ¼ of a mile southwest of Sucarnatchie Creek bridge, and about 1 mile from Livingston (R. pp. 102-103). The third point of contact of the tornado with the earth was at Sucarnatchie Creek bridge where the train was derailed, this point being located ¼ of a mile due north from the Browder Place (R. p. 103). After derailing the train at Sucarnatchie Creek bridge, the tornado then took a northeasterly course, generally along the track, and after striking the respondent's station at Livingston, the tornado then proceeded in a northeasterly direction toward Montgomery, Alabama (R. p. 104).

Shortly prior to the derailment, the respondent's freight train had taken a siding at Parker, Alabama, to permit two passenger trains to pass (R. p. 10). After the passenger trains had passed, the respondent's train pulled out of the siding and proceeded toward Livingston at a rate of speed of about 30 miles per hour, the train not having had time to resume the scheduled speed of 45 miles per hour (R. pp. 15 and 33). When the train reached a point about ¾ of a mile from Livingston (R. p. 31), and as the train was passing over a rise in the track, sometimes referred to as a "hump," the engineer for the first time observed the tornado cloud ahead of him, somewhere in the direction of Hixon and York (R. p. 14). The train was then about 1¾ miles from where it was struck by the tornado at Sucarnatchie Creek bridge (R. p. 15). When the engineer first saw the tornado, it was a little bit to the right (north) of the track (R. p. 14), but he could not tell exactly where it was in reference to Hixon or York (R. p. 24). The tornado looked like it was going a little to the left (south) and heading in the direction of the train (R. p. 24). The engineer said the tornado crossed the track at an angle from right (north) to the left (south), a little better than a mile from York, between Hixon and York (R. pp. 24-25). The tornado was coming a little in the direction of the train (R. p. 25). The engineer said he then saw the tornado on the fireman's side (south of the track) when the train was at a curve near the south switch at the station at Livingston, and the tornado looked like it was coming right into the train on the fireman's side (R. p. 25). The engineer could not say how far away the tornado was on the left-hand side of the track, but it was coming across some humps back there, or little hills. The train was going around the curve and it looked like the train was in the tornado, but it did not hit until the train got across Sucarnatchie Creek bridge. The tornado was not right on the track at that time (R. p. 26). The engineer said that when the tornado hit the train, it hit from the right (north) side (R. p. 27).

When the engineer first saw the tornado, the wind was blowing and there was thunder and lightning (R. p. 31). The tornado struck and derailed the train within 2 or 3 minutes after the engineer first saw the tornado ahead (R. p. 28). The engineer described the tornado as a funnel-shaped cloud hanging low on the tree tops and very black around it, and a kind of light streak through the center (R. p. 14). The engineer had never seen a tornado before that one (R. pp. 13 and 30), but he figured it was a cyclone or tornado, or something of that kind (R. p. 16). The train was being operated by the engineer in a normal manner and under orders (R. p. 10), at a speed of about 30 miles per hour when the presence of the tornado was discovered (R. p. 33), and the engineer made no application of brakes (R. p. 46). The engineer said, in answer to a question by counsel, that after he saw the tornado he could have stopped the train in less than one minute and within a distance of 800 feet (R. pp. 17-18). It was found, after the tornado had passed, that nothing was disturbed on the track between respondent's station at Livingston and the hump (R. p. 18).

The train consisted of the engine, tender, 50 loaded cars, and the caboose (R. p. 12). The entire train was blown from the track, except the engine, tender, and 6 of the cars nearest the engine. Nearly all of the cars and their loads were either destroyed or greatly damaged (R. pp. 33-34). The caboose in which the train conductor and plaintiff's intestate, James Emory Roberts, were riding, was completely demolished and the conductor and Roberts died as the result of injuries sustained in the wreckage.

SUMMARY OF ARGUMENT.

I.

The death of petitioner's intestate was caused solely by an act of God.

II.

Liability under Federal Employers' Liability Act can be predicated only upon actionable negligence.

III.

Petitioner has assigned no sufficient reason for granting certiorari.

ARGUMENT.

I.

The death of petitioner's intestate was caused solely by an act of God.

The record in this case reveals that the derailment of respondent's train and the consequent death of petitioner's intestate were due directly and exclusively to an act of God without intervention of respondent, and could not have been prevented by any foresight exercised by the respondent's engineer. The derailment of the train resulting in the death of Roberts should be classified as—

> "Any accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected, could have been prevented." 1 *Corpus Juris Secundum*, Act of God, page 1423.

It is our view that the petitioner's contention with respect to actionable negligence cannot stand the test of actionable negligence, as it is defined and applied by the courts in this country.

> "* * * In every case involving negligence there are necessarily three elements essential to its existence: (1) The existence of a duty on the part of defendant to

> protect plaintiff from the injury; (2) failure of defendant to perform that duty; and (3) injury to plaintiff from such failure of defendant. When these elements are brought together, they unitedly constitute actionable negligence, and the absence of any one of these elements renders the complaint bad or the evidence insufficient. A judicial definition bringing out with admirable conciseness the elements of actionable negligence is as follows: 'Negligence is an unintentional breach of a legal duty causing damage reasonably foreseeable without which breach the damage would not have occurred.'" 45 *Corpus Juris,* Negligence, page 632.

The difficulty with petitioner's case is that the record does not supply and unite the necessary elements to constitute actionable negligence. While there was an ever-present duty on the part of the respondent's engineer to exercise due care to protect the train from any disaster, it cannot be correctly asserted, upon the evidence in the record, that anything the respondent's engineer did or failed to do was a proximate cause of the derailment, because the engineer, being unable to foresee when, where, how or with what effect the tornado would strike, was powerless to exercise any degree of care with respect to the safety of his train. Whatever effort he would have made would have been to gamble with the unpredictable action of supernatural power, which no court has ever required of men in their human relationships.

The tornado in the instant case was typical of the action of tornadoes, as described by the testimony in this case. The cloud to which the funnel was attached proceeded in a more or less steady course, generally along the vicinity of the tracks of the railroad between Livingston and York, but the funnel rose and fell, skipped, twisted, circled and shifted from one side of the path of the cloud to the other, varying in points of contact with the earth, by about ¼ of a mile. The evidence is that the funnel struck the earth on the north side of the track, a mile or two from York, and

then rose and moved to the south side of the track, at an angle of about 45 to 60 degrees, and did not contact the earth again until it struck about 6 miles away, at the Browder Place, which is located at a point about ¼ of a mile southwest of Sucarnatchie Creek bridge. This means that the funnel, like the tail of a kite, swung and lashed about over the earth for a distance of 6 miles without contacting the earth at any point or doing any damage, but at the Browder Place, the funnel struck again and, after doing considerable damage, changed its course, proceeded in a due north direction and struck again at Sucarnatchie Creek bridge, where it derailed the train at a point ¼ of a mile north of the Browder Place. Then, after remaining on the ground for a distance of about 1 mile, the funnel rose again and proceeded in a northeasterly direction without doing any damage, in so far as the evidence discloses.

Not only were these three points of contact with the earth separated by distances ranging from ¼ to 6 miles, along the line of the path of the storm, but each point of contact of the funnel with the ground refers to a change of direction in the movement of the funnel. In short, the funnel of the tornado, as its movements were distinguished from the cloud to which it was attached, rose, dipped, twisted and shifted, proceeding somewhat in a zig-zag fashion, stabbing at the earth at irregularly separated points, from one end of this segment of the path to the other.

We have included in the statement of facts some parts of the engineer's testimony relating to what he observed and what he did or did not do in the circumstances. This testimony is material only as describing the character and action of this tornado because whatever the engineer did or did not do, in the circumstances of this case, is wholly immaterial on the issue of negligence.

Obviously, in so far as human discernment was concerned, the train was just as safe at one point on the track as another. The train was in the area of the tornado the

moment its presence was discovered. The train was derailed within 2 or 3 minutes from the time the engineer first saw the tornado ahead of him. The fact that the engineer could have stopped the train in less than a minute and within 800 feet of the point where he first observed the tornado, and the fact that the tornado did not happen to pass over the track at the point where he could have stopped the train, are facts of no material consequence. The fact that after an accident has happened it can be shown how it could have been prevented, is no evidence of negligence. *L. & N. R. R. Co.* v. *Finlay*, 237 Ala. 116, 185 So. 904.

In the absence of the engineer's power of divination to make any prediction at all as to where the tornado would strike the earth, if it made any contact at all, the train would have been in just as much danger at the hump as anywhere else. The point is that it was impossible for the engineer, by the exercise of any human foresight, to have predicted when, where or how, or with what effect, the tornado would make contact with the earth's surface, and in that situation, the engineer, as an ordinarily prudent man, was powerless to make a sensible choice between any number of courses open to him. So, it was not a question whether the respondent's engineer exercised due care, but rather whether he could exercise any care at all, in the sense due care is required in the law of negligence. The court below said there was not any negligence on the part of the engineer, because, as a mere human being, he could not foresee what would be the effect of what he would do or not do, in relation to the unpredictable course of a tornado, directed by the hand of God.

To suggest, upon the facts in the record, that the engineer could have foreseen when, where, how and with what effect the tornado would strike, and shaped his conduct accordingly, would be to suggest the capability of a mere human being to match wits with the Supreme Being.

The attention of the Court is called particularly to the testimony of the witness who was in charge of the United

States Weather Bureau and who testified, in substance, that the Bureau would not undertake to give warning with respect to the movements of a tornado because of the impossibility of making any reliable predictions where a tornado would strike.

This case, in its extraordinary factual setting, should not be confused with that category of cases in which an individual, by the exercise of reasonable foresight, can guard against the consequences of acts of God, and failing to do so, has been held liable, such as: where a railroad's failure to maintain a proper ditch between track and nearby hillside, from which dirt and rocks fell upon the track, was held to be a cause of the accident concurring with a rainfall, assuming the latter to be an "act of God," *Blessing* v. *Camas Prairie R. Co.*, 3 Wash. 2d 266, 100 P. 2d 416 (1940); where a store owner's failure to correct a defective condition of window was held to be responsible for injuries to the plaintiff, there being no evidence of a *vis major* in a rain and wind that was blowing 36 miles per hour, *Leonard Bros.* v. *Newton*, Tex. Civ. App., 71 S. W. 2d 613, error dismissed, 129 Tex. 1, 101 S. W. 2d 233 (1937); where a railroad's failure to inspect the track after a heavy rainfall, causing ballast to be washed away, removed the case from the rule applicable to acts of God, *Whitaker* v. *Pitcairn*, 351 Mo. 848, 174 S. W. 2d 163 (1943); where defendant's failure to construct and maintain properly a culvert for the purpose of diverting water from its natural course, and not an extraordinary rainstorm, was held to be responsible for damages to plaintiff's property, *Atkinson* v. *Chesapeake & O. Ry. Co.*, 74 W. Va. 633, 82 S. E. 502 (1914); where a building owner's failure to remove, or support, walls of a building destroyed by fire, and not a strong gale, was responsible for property damage and personal injuries, *Teter* v. *Olympia Lodge No. 1, I. O. O. F.*, 195 Wash. 185, 80 P. 2d 547 (1938); and where defendant's failure to drain water from certain pipes which furnished heat, and not the sudden cold weather, was responsible for the bursting of the

pipes and resulting damage to plaintiff's property, *Peru Heating Co.* v. *Lenhart*, 48 Ind. A. 319, 95 N. E. 680.

The foregoing cases are typical of the many cases where the courts have found that an "act of God" will not excuse the defendant if ordinary care required certain action or inaction in order to anticipate or provide against injury or damage from such natural phenomenon, but that line of decisions is clearly distinguishable from the line of decisions, applicable to the instant case, where individuals charged with a duty are relieved of responsibility for not taking a given course of action for the reason that they could not foresee the consequences of any course of action that may be chosen, in relation to a wholly unpredictable act of God, in directing the forces of nature.

We call to the attention of the Court the carefully considered opinion of the Supreme Court of Alabama, 250 Ala. 629, 35 So. 2d 509. This is the opinion rendered by the Supreme Court of Alabama, on May 20, 1948, when this case was first considered by the Alabama Court. In that decision, the Alabama Court has cited and quoted at length from the opinions in the cases of *Galveston, H. & S. A. R. Co.* v. *Crier*, 100 S. W. (Texas) 1177; *Pierce* v. *Great Falls & C. Ry. Co.*, 56 P. (Mont.) 867; and *McClary* v. *Sioux City & P. R. Co.*, 3 Neb. 44. These cases hold, upon factual situations somewhat similar to the facts in the instant case, that there can be no actionable negligence in cases of this kind. The instant case is perhaps factually stronger against the establishment of liability than any of the cases cited by the Supreme Court of Alabama. We think the closing paragraph of the opinion by the Alabama Court so strongly and clearly states the law as it was and should have been applied in this case that a lengthy quotation of that part of the opinion is justified. Justice Stakely, in writing for a unanimous Court, at p. 513 (35 So. 2d), said:

> "Upon a careful consideration we do not see how the engineer in the case at bar can be charged with negligence. He saw the threatening cloud only 2 or 3

minutes before it struck the train. It is quite true that if he had stopped the train at the hump, the train would not have been struck and derailed. But how can it be reasonably said that the engineer should have stopped at the hump? Can it be that the engineer should have been able to predict the course of a tornado? Suppose he had stopped at the hump and the tornado lifting from its point of contact with the earth at York had struck the train at the hump? The hump was only about a mile and three-fourths from where the train was struck. Would he then have been guilty of negligence for failing to proceed? The very course which the storm in the present case took demonstrates, as shown by its path of destruction, that it is unreasonable to consider that the engineer should have been able to predict its course, especially when its width was only 100 to 120 feet. It struck at York and then lifted and came down about a quarter of a mile south of the railroad tracks at the Browder Place in the vicinity of Livingston. It then veered north and struck the tracks and then turned and followed the tracks for a comparatively short distance and then veered to the northeast. It must be remembered that the engineer was under orders to run his train according to a schedule and he was proceeding under these orders. Is it reasonable to think that every time an engineer sees a threatening cloud in the sky approaching in his direction, he should stop his train? If so, what should he then do? Should he continue to stand still or reverse the engine and run it backwards to escape the storm? According to the engineer the storm was traveling generally along the tracks. Is it not reasonably possible that a stop would have left the train defenseless in its path? All of this goes to show that in proceeding on his regular course the engineer was not doing something which an ordinarily prudent person would not have done under the circumstances, because there is too much room for conjecture and uncertainty for him to be required to do otherwise. The fact that after an accident has happened it can then be shown how it could have been prevented is no evidence of negligence. Louisville & N. R. Co., v. Finlay, 237 Ala. 116, 185 So. 904."

II.

Liability under Federal Employers' Liability Act can be predicated only upon actionable negligence.

Whatever may be said of the purpose and intent of the Federal Employers' Liability Act (45 U.S.C. §51, *et seq.*), this Court holds unalterably to the position that this Act does not make the employer the insurer of the safety of employees while on duty. The basis of liability is actionable negligence and not the fact that an injury has occurred. This Court held to that view in the *Tiller*[1], *Bailey*[2], *Lavender*[3], and *Ellis*[4] cases cited on page 6 of the petitioner's petition in the instant case. In view of the fact that respondent's engineer could not have possibly foreseen where, when or how the tornado would strike, for the Supreme Court of Alabama to have held that there was a jury issue in this case would have been tantamount to holding that the respondent was the insurer of the safety of Roberts.

This Court has consistently denied petitions for writs of certiorari where the record does not reveal the presence of actionable negligence. *Great Northern R. Co.* v. *Knapp*, 240 U. S. 464; *Erie R. Co.* v. *Welsh*, 242 U. S. 303; *Beamer* v. *Virginian R. Co.*, 321 U. S. 763; *Cowdrick* v. *Penn. R. Co.*, 323 U. S. 799; *Negro* v. *Boston & Maine R.*, 324 U. S. 862; *Fantini* v. *Reading Co.*, 324 U. S. 856; *Scarborough* v. *Pennsylvania R. Co.*, 326 U. S. 755; *Chisholm* v. *Reading Co.*, 329 U. S. 807; *Waller* v. *Northern P. T. Co.*, 329 U. S. 742; *Wolfe* v. *Henwood*, 332 U. S. 773; *Lasagna* v. *McCarthy*, 332 U. S. 829; *Trust Co. of Chicago* v. *Erie R. Co.*, 334 U. S. 845.

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[1] *Tiller* v. *Atlantic Coast Line R. R. Co.*, 318 U. S. 54.
[2] *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350.
[3] *Lavender* v. *Kurn*, 327 U. S. 645.
[4] *Ellis* v. *Union Pacific Railroad Company*, 329 U. S. 649.

III.

Petitioner has assigned no sufficient reason for granting certiorari.

Under the heading of "Reasons for Granting the Writ," counsel for the petitioner have cited the well-known decisions in the cases of *Tiller, Bailey, Lavender* and *Ellis,* as decisions with which the decision of the Supreme Court of Alabama in the instant case conflicts. That is the sole reason assigned by counsel for petitioner as ground for granting the petition in this case. It is respectfully submitted that the decision of the court in the Alabama case in no wise conflicts with the decisions of this Court in the cases of *Tiller, Bailey, Lavender, Ellis,* or with any other decision of this Court.

In the cases of *Tiller, Bailey, Lavender, Ellis,* and other similar cases, however slight the evidence was that this Court regarded as sufficient to take a particular case to the jury, it was evidence of acts or omissions, the foreseeable consequences of which might result in injury or death to a railroad employee. However, such elements of foreseeability of consequences in that line of cases is totally absent in the facts of the instant case, in that, due to the total unpredictable effect of an act of God in directing the course of a tornado, it was humanly impossible for the respondent's engineer to have so exercised his mere human faculties as to have given him any assurance at all that he could have kept the train from contact with the varying course of a violent and unbridled force of nature.

The total absence of the element of foreseeability of the consequences of the action or non-action of the respondent's engineer in the instant case is a circumstance that so definitely distinguishes this case from the line of cases cited by the petitioner, that the decision of the Supreme Court of Alabama in the *Roberts* case cannot be correctly said to be in conflict with the decisions of this Court in the cases of *Tiller, Bailey, Lavender, Ellis,* and other similar decisions.

It is respectfully submitted that, in the light of the clear distinction between the decision of the Supreme Court of Alabama, upon the facts in the instant case and the facts in the decisions of this Court in the Federal Employers' Liability Act cases cited in the petition, counsel for petitioner have not presented any valid reason why this Court should grant a writ of certiorari in this case.

CONCLUSION.

In conclusion, it is respectfully submitted that the petitioner has not shown sound grounds for granting certiorari, and that the petition should be denied.

Respectfully submitted,

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